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No. 00-276

Supreme Court
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA and
UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR*
CLINT BOLICK
SCOTT G. BULLOCK
MATTHEW B. BERRY
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute seeks to reinvigorate the founding principles of the First Amendment by protecting the free flow of political and commercial information indispensable to our republican form of government and to our free enterprise economy. The instant case involves not only the degree of scrutiny afforded commercial speech restrictions, but also the government's ability to compel individuals and corporations to fund the commercial speech of others. As such, it implicates the Institute's interest in the full protection of commercial speech, which includes both the right of Americans to speak freely as well as the corresponding right of Americans to remain silent.

STATEMENT OF THE CASE

Respondent United Foods, an American mushroom producer, conducts a comprehensive promotional campaign with the aim of convincing consumers to purchase

[1] In conformity with Supreme Court Rule 37, the Institute for Justice has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. The Institute also states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

its "Pictsweet" brand mushrooms. The company's advertising efforts are targeted only to those local markets where United Foods mushrooms are available,[2] and its marketing strategy is to differentiate United Foods mushrooms from those offered by other mushroom producers.

Federal law, however, also compels United Foods to pay a monthly assessment to the Mushroom Council, which is used to fund a generic nationwide advertising campaign promoting mushroom consumption. The assessment in question is authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101-6112, and was implemented by an Order issued by the Secretary of Agriculture in 1993. 7 C.F.R. § 1209.51. Pursuant to the Secretary's Order, the Mushroom Council, which is comprised of mushroom producers nominated by fellow producers and selected by the Secretary, 7 U.S.C. § 6104(b), levies an assessment of up to one penny a pound on any persons or corporations producing or importing more than 500,000 pounds of mushrooms annually for the "fresh" market. See 7 C.F.R. §§ 1251-52. The Council then uses these funds for advertising that is designed, among other purposes, "to strengthen the mushroom industry's position in the marketplace." 7 C.F.R. § 1209.39(l). Such advertising is generic, meaning it may not contain any "reference to a

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[2] Because of the financial costs of shipping mushrooms as well as the fact that mushrooms are easily damaged while in transit, United Foods only sells its mushrooms in local markets in close proximity to one of the company's three mushroom farms.

brand name, trade name, or State or regional identification of any mushrooms or mushroom product." 7 C.F.R. § 1209.40(d).

The Council currently collects assessments from roughly 150 commercial producers and spends about one million dollars a year to promote the consumption of mushrooms. See Michael Doyle, "Mushroom Battle Over Ads Coming to a Head," *Fresno Bee* (Jan. 4, 2001) at C1. Among recent promotional efforts, the Council recently partnered with Ernest and Julio Gallo Wineries for a joint advertising campaign. The campaign featured supermarket floor displays enticing consumers to purchase fresh mushrooms as well as selected Gallo wines. "Mushroom Council, Winery in Joint Promotion," *Supermarket News* (Feb. 21, 2000) at 50. The Council also mounted a Valentine's Day initiative depicting mushrooms as aphrodisiacs. Wendy Davis & Ira Teinowitz, "Top Court to Eye Co-op Ads", *Advertising Age* (Dec. 4, 2000) at 1.

In 1996, United Foods refused to pay the monthly assessment levied by the Mushroom Council and filed a petition with the Secretary of Agriculture claiming that the federal government's compelled assessment program violated its First Amendment rights. United Foods principally objected to the assessments because it contended that the Council's advertising campaign undermined the company's own promotional efforts. While United Foods' marketing campaign sought to convince consumers that the company's "Pictsweet" mushrooms were better than the other mushrooms offered for sale in the marketplace, the Council's advertising campaign suggested a conflicting message: mushrooms were a generic, homogenous product.

The company also has ethical objections to some of the Council's activities. In particular, United Foods supports neither the Council's decision to associate mushrooms with the consumption of alcohol through its joint promotion with Gallo wines nor the Council's Valentine Day's campaign portraying mushrooms as aphrodisiacs.[3]

The United States responded to the company's petition by filing suit in the United States District Court for the Western District of Tennessee, seeking to require the company to pay its assessments, which totaled approximately $8,000 a month.[4] The Department of Agriculture subsequently ruled against the company, and United Foods then filed its own complaint in federal district court attacking the constitutionality of the assessments.[5]

In 1998, the district court upheld the constitutionality of the compulsory assessments. See *United States v. United Foods, Inc.*, No. 98-01082, slip op. (W.D. Tenn. July 31, 1998). The U.S. Court of Appeals for the Sixth Circuit, however, reversed a year later, holding that the use of compulsory assessments for generic mushroom advertising violated United Foods' First Amendment rights. See *United Foods, Inc. v. United States*, 197 F.3d 221 (1999). This Court has granted *certiorari* to review the Sixth Circuit's

---

[3] United Foods also complains that the Council's advertising campaign is ineffective because it is too small and insufficiently tailored to local conditions to have any effect on the marketplace.

[4] Wendy Davis & Ira Teinowitz, "Top Court to Eye Co-op Ads," *Advertising Age* (Dec. 4, 2000) at 1.

[5] This suit was consolidated with the action brought by the United States against United Foods.

ruling. See *United States v. United Foods, Inc.*, 121 S. Ct. 562 (2000).

SUMMARY OF ARGUMENT

This Court should subject the mandatory assessments imposed by the federal government on selected mushroom producers to First Amendment scrutiny and affirm the judgment of the Sixth Circuit striking down the compulsory assessment program as a violation of the First Amendment.

In a long line of cases beginning with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), this Court has ruled that commercial speech is entitled to First Amendment protection. This Court's precedents further make it clear that the generic mushroom advertisements at issue in the instant case constitute protected commercial speech and that spending money for the purpose of disseminating such advertising is also protected by the First Amendment. So, for example, if the federal government sought to forbid United Foods from paying for advertisements for its own "Pictsweet" mushrooms, such a law under this Court's jurisprudence would be subject to heightened First Amendment scrutiny pursuant to the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

In another long line of cases beginning with *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court has also recognized that the First

Amendment guards against government attempts to compel speech as well as attempts to compel silence, and that any distinction between the two is not of constitutional significance. As a result, since government efforts to forbid an agricultural producer from paying for its own advertising would be subject to First Amendment scrutiny, a government mandate requiring a producer to financially support others' advertising should trigger First Amendment scrutiny as well.

In *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), however, this Court avoided the logical consequence of its commercial speech and compelled speech precedents and held that agricultural producers could be required to fund advertising and then to cede editorial control over the commercial message. It reasoned that being required to make contributions for others' speech does not implicate the First Amendment so long as the speech in question is neither political nor ideological. This Court also suggested that to state a viable compelled speech claim under the First Amendment, an objecting party must disagree with the message contained in the speech it is being required to support.

Amicus respectfully suggests that this Court should abandon its holding in *Glickman*. This Court's refusal to apply First Amendment scrutiny to the compelled financing of expressive speech without a political or ideological message implies disturbing consequences and finds no support in this Court's pre-*Glickman* precedents. It represents a marked departure from this Court's holdings that the distinction between compelled speech and compelled silence is of no constitutional significance and that its

compelled speech jurisprudence applies in the commercial context. Similarly, this Court's suggestion that a viable First Amendment claim requires an objector to disagree with the message it is being compelled to support is wholly at odds with this Court's pre-*Glickman* jurisprudence. Moreover, the Court's assumption in *Glickman* that agricultural producers will not disagree with the message relayed by generic advertising campaigns is entirely inaccurate. In this case, for instance, United Foods disagrees with the message of product homogeniety conveyed by the Mushroom Council's generic advertising campaign.

This Court should therefore abandon *Glickman* and apply heightened First Amendment scrutiny to the mandatory assessments at issue in the instant case. And because the assessments fail to pass constitutional muster under either the *Central Hudson* test or the strict scrutiny *amicus* believes should apply to commercial speech restrictions, the judgment of the Sixth Circuit should be affirmed.

ARGUMENT

I. TRUTHFUL SPEECH PROMOTING MUSHROOM CONSUMPTION IS PROTECTED BY THE FIRST AMENDMENT.

This Court's jurisprudence leaves no doubt that the First Amendment safeguards a corporation's ability to advertise agricultural products, such as mushrooms. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, this Court made it clear that commercial

speech enjoys robust First Amendment protection, invalidating a Virginia statute prohibiting licensed pharmacists from advertising prescription drug prices. In this landmark ruling, it noted that the "free flow of commercial information is indispensable" to the functioning of our free enterprise economy, 425 U.S. at 765, and observed that "a consumer's interest in the free flow of commercial information" may be greater "than his interest in the day's most urgent political debate." *Id.* at 763.

Four years after *Virginia State Board of Pharmacy*, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), this Court once again reaffirmed that commercial speech enjoys First Amendment protection by striking down as unconstitutional a New York regulation banning promotional advertising by electric utilities. In so doing, this Court formulated a four-part test for evaluating the constitutionality of commercial speech restrictions:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

The Court has since applied the *Central Hudson* test in finding that a variety of commercial speech restrictions violate the First Amendment. See, e.g., *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S.

173 (1999) (invalidating federal statute prohibiting radio and television stations from broadcasting advertisements for lawful casino gambling); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking down state ban on price advertising of liquor); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating federal regulation prohibiting beer labels from displaying alcohol content); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down regulation banning in-person solicitation by certified public accountants).

From a constitutional standpoint, it makes no difference whether an advertiser is an individual or a corporation. This is because First Amendment protection does not depend on the legal status of a speaker, "whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

This Court has also recognized that the First Amendment would be little but an empty formalism if the government allowed a citizen the freedom to speak but forbade him from paying others to produce or disseminate his or her speech. In *Central Hudson*, for example, upon closer examination it is clear that this Court more specifically held that a utility's expenditures for advertising constituted commercial speech protected by the First Amendment; in that case, the utility itself was not literally speaking but instead incurring "advertising expenses." See 447 U.S. at 559. See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (corporate expenditures for advertising on referendum protected by First Amendment); *Buckley v. Valeo*, 424 U.S. 1 (1976) (contributions and expenditures for political advertising trigger First Amendment scrutiny).

Pulling together these disparate strands of First Amendment jurisprudence and applying them to the instant case, one conclusion is apparent: if this case involved a federal regulation restricting United Foods' ability to pay for the truthful advertising of its own "Pictsweet" mushrooms, First Amendment scrutiny would obviously be triggered. See, e.g., *Glickman*, 521 U.S. 457, 469 n.12; *id.* at 505 (Thomas, J., dissenting). As we argue below, the fact that it *requires* respondent to pay for speech creates no constitutional distinction.

II. THE GOVERNMENT'S POWER TO COMPEL SPEAKERS TO PROMOTE MUSHROOM CONSUMPTION IS RESTRICTED BY THE FIRST AMENDMENT.

"The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This bedrock First Amendment principle was first established in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), when this Court ruled that the government could not compel individuals to salute the flag.

Since then, this Court has consistently held that the First Amendment restricts the government's ability to compel speech in the same manner as it restricts the government's power to censor speech. See *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without

constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say") (emphasis in original); see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (holding that government cannot compel parade organizers to include marchers representing message organizers do not wish to have expressed); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down requirement that political pamphleteers identify themselves in their literature); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state may not compel individuals to display state motto on their automobile license plates); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating statute requiring newspaper to give space to political candidates to reply to criticism contained in the newspaper).

Given that commercial speech is protected under the First Amendment, it is not surprising that this Court has held that compelled commercial speech similarly triggers First Amendment scrutiny. In *Ibanez v. Florida Department of Business*, 512 U.S. 136 (1994), for example, the Court struck down a Florida law requiring accountants to supply a lengthy disclaimer whenever advertising any private certifications they had obtained. Concluding that the law abridged the right to free speech, it held that the detailed disclaimer was not "appropriately tailored" to serving the state's alleged interest in preventing consumer deception and that the state had not even demonstrated that any disclaimer was necessary to protect consumers. *Id.* at 146-47.

To be sure, from the beginning of its modern commercial speech jurisprudence, this Court has explicitly noted that the First Amendment does not forbid the government, under certain circumstances, from requiring advertisers to include specified information or disclaimers in their promotional materials. See *Virginia Pharmacy*, 425 U.S. at 771 n.24. When it has approved of the constitutionality of such compelled commercial speech, however, the Court before its *Glickman* decision four years ago had always cited as its justification the state's interest in preventing consumer deception. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (affirming the constitutionality of a mandated disclaimer in lawyer advertisements promoting contingency-fee arrangements on the grounds that the ads otherwise had a "self-evident" propensity to deceive consumers).[6] As the California Supreme Court has stated, "The First Amendment's right to freedom of speech allows compelling one who engages in commercial speech to say through advertising what he otherwise would not say, even about a lawful product or service, in order to render his message truthful and not misleading. Consumer protection is the justification [for compelled commercial speech] – apparently, the sole one." *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720 (Cal. 2000) (citing, among other cases, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492-93 (1995) (Stevens, J., concurring)).

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[6] Strangely, this Court in *Glickman* did not cite *Ibanez*, *Zauderer*, or any other prior case implicating compelled commercial speech.

This "consumer deception" exception in the area of compelled commercial speech is arguably quite consistent with the first prong of the *Central Hudson* test used to scrutinize commercial speech restrictions. Just as the *Central Hudson* test does not prevent the government from restricting misleading or untruthful commercial speech, it makes sense as a corollary to allow government to compel certain commercial speech for the purpose of ensuring that accompanying commercial speech is not deceptive.

Applying this Court's jurisprudence to the mushroom industry, it is thus apparent that while the federal government could require United Foods in certain instances to include information in its advertisements to prevent consumer deception, it certainly could not require the company to launch its own advertising campaign if United Foods preferred not to promote its products. The First Amendment protects the company's freedom not to advertise as well as its liberty to advertise.

III. MANDATORY ASSESSMENTS FOR GENERIC ADVERTISING CAMPAIGNS SHOULD TRIGGER FIRST AMENDMENT SCRUTINY.

Because the First Amendment protects both the right to fund speech and the right to refrain from speaking, this Court has long recognized that government efforts to require private individuals or entities to financially support the private speech of others implicate First Amendment concerns. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), for example, this Court held that a teachers' union could not use the "agency fees" paid by

objecting non-members to fund the union's political speech. Rather, it ruled that compelled payments could be used only for activities germane to the collective bargaining process. *Id.* at 235-36. The Court reasoned that being compelled to fund the speech of others "works no less an infringement of . . . constitutional rights" than being prohibited from making such expenditures. *Id.* at 234. Thomas Jefferson foreshadowed this Court's decision in *Abood* almost two hundred years before when he wrote, "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), reprinted in 5 *The Founders' Constitution* (Kurland & Lerner eds., 1987).

In decisions since *Abood*, this Court has continued to carefully limit government's ability to levy compulsory assessments for the funding of private speech. For instance, this Court has gone on in the labor union context to extend its *Abood* holding to prohibit the use of "agency fees" for non-political and non-ideological speech that is not germane to the collective bargaining process. It has held that to survive First Amendment scrutiny, such assessments must be used for activities germane to a legitimate regulatory scheme, justified by a vital policy interest of the government, and not add significantly to the burdening of free speech inherent in achieving those interests. See, e.g., *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (disallowing, among other expenditures, the use of compelled funds to finance a public relations campaign to enhance the reputation of the teaching profession).

Given the *Abood* line of cases as well as cases such as *Ibanez*, which make it clear that the First Amendment's concern with compelled speech extends to the commercial context, one would think that the use of mandatory assessments to fund commercial speech would similarly trigger First Amendment scrutiny. In *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), however, this Court reached the opposite conclusion, holding that a compelled levy used to fund a generic advertising campaign for California tree fruits was merely "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress," *id.* at 477, and not one that "warrant[ed] special First Amendment scrutiny." *Id.* at 474.

Amicus respectfully suggests that the holding in *Glickman* is an aberrant outlier from the main body of this Court's compelled speech jurisprudence as well as its commercial speech jurisprudence and should therefore be overturned.[7] The reasoning underlying *Glickman* is unpersuasive, based on inaccurate assumptions, and, if applied in future cases, holds the potential to seriously undermine fundamental First Amendment freedoms.

To be sure, *stare decisis* is an important "principle of policy." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). However, "[w]hen governing decisions are unworkable or badly reasoned, this Court has never felt

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[7] *Amicus* does not express a view as to whether this Court's holding in *Glickman* extends only to those segments of the agricultural economy extensively regulated by the federal government.

constrained to follow precedent." *Id.* (internal quotations and citations omitted). This is "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.' " *Id.* (internal quotations and citations omitted).

Examining the primary justifications used by this Court in *Seminole Tribe* for deciding to overrule *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *amicus* suggests that these same factors counsel this Court to overrule *Glickman* in the instant case. Just as "*Union Gas* . . . proved to be a solitary departure from established law," *Seminole Tribe*, 517 U.S. at 66, so too has *Glickman* proven to be an isolated departure from this Court's First Amendment jurisprudence. In not a single decision since *Glickman* was issued, has this Court cited to its majority opinion. Similarly, just as "*Union Gas* . . . created confusion among the lower courts seeking to understand and apply the . . . decision," *id.* at 64, so too have lower courts come to differing conclusions as to the rationale underlying this Court's decision in *Glickman*. Compare *United Foods*, 197 F.3d at 221 (failure to subject assessments to First Amendment scrutiny dependent upon collectivization of California tree fruit industry) and *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 969, 975 (9th Cir. 1999) (same), with *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998) (applying opposite interpretation of *Glickman* in the context of the unregulated beef industry).

Most importantly, however, just as the "plurality's rationale [*in Union Gas*] . . . deviated sharply from [this Court's] established federalism jurisprudence," *Seminole Tribe*, 517 U.S. at 64, so too did the majority's rationale in

Glickman deviate dramatically from this Court's established compelled speech and commercial speech jurisprudence.

To begin with, this Court declined to subject the mandatory assessments in *Glickman* to First Amendment scrutiny because it claimed they were not used to fund the dissemination of "any political or ideological views." *Glickman*, 521 U.S. at 469-70. This distinction, however, is sharply at odds with other areas of this Court's compelled speech jurisprudence. In the labor union context, for instance, this Court has applied First Amendment scrutiny to assessments imposed for non-political and non-ideological activities, holding them to be unconstitutional if not germane to collective bargaining. See *Lehnert*, 500 U.S. at 511-19; see also *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 435, 444-55 (1984) (interpreting statute in a similar manner so as to avoid constitutional difficulties); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 298-302 (1st Cir. 2000) (summarizing this Court's jurisprudence with respect to this issue).

The majority's reasoning in *Glickman* is similarly inconsistent with this Court's holding in *Riley* that the difference between "compelled speech" and "compelled silence" is one "without constitutional significance." 487 U.S. at 796-97. When reviewing restrictions on the ability of private individuals or entities to fund speech, this Court has never suggested that restrictions aimed at only certain types of speech trigger First Amendment scrutiny while those targeting other types of speech do not. It does not matter whether the government is restricting one's ability to fund political, artistic, or commercial speech; all

restrictions must survive some type of First Amendment scrutiny.

Therefore, by refusing to subject the compelled funding of commercial speech to any First Amendment scrutiny whatsoever, *Glickman* marks a significant departure from this Court's steadfast refusal to make a distinction between compelled speech and compelled silence. If the government attempted to forbid an agricultural producer from funding its own advertising campaign, there is no question that First Amendment scrutiny would apply.

In *Glickman*, this Court suggested that the link between money and speech is somehow different in the compelled speech context than it is in the realm of speech restraints. Referring to the mandatory assessments paid by those in the California tree fruit industry, it stated, "Respondents are not required themselves to speak, but are merely required to make contributions for advertising." 521 U.S. at 471. But applying the logic of this statement to a hypothetical situation involving a government regulation forbidding corporations from purchasing advertising reveals its obvious flaw, for this Court would certainly never suggest that such a restriction did not trigger First Amendment scrutiny because: "Respondents are not forbidden from speaking, but are merely forbidden from paying for advertising."

Given this Court's current commercial speech jurisprudence, any effort to subject compelled payments for commercial speech to a different level of scrutiny than compelled payments for political or ideological speech must be linked to the government's interest in ensuring that consumers are not deceived. As Justice Stevens has

noted, "any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." *Rubin*, 514 U.S. at 494 (Stevens, J., concurring). Here, however, it is obvious that neither the mandatory assessment at issue in *Glickman* nor the one under attack in the instant case has any relationship to remedying consumer deception or countering untruthful advertising. Rather, they are generally designed to stimulate demand for agricultural products. See, e.g., 7 C.F.R. § 1209.39(l) (purpose of generic mushroom advertising program is to "strengthen the mushroom industry's position in the marketplace").[8]

In *Glickman*, this Court also justified declining to subject mandatory assessments to First Amendment scrutiny by reasoning that the compelled commercial speech did not engender any "crisis of conscience" among tree fruit producers. *Glickman*, 521 U.S. at 472. It noted that "[n]one of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit." *Id.* The Court then concluded that "since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program." *Id.* at 470.

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[8] Indeed, depending upon one's view of whether mushrooms are aphrodisiacs, it could be argued that respondent is being forced to contribute to misleading advertising.

But this justification for refusing to apply First Amendment scrutiny to mandatory assessments for generic advertising programs again suffers from at least two flaws. First, it introduces a new qualification nowhere previously found in this Court's compelled speech jurisprudence: In order to state a compelled speech claim under the First Amendment, one must disagree with the message one is being required to support. Before *Glickman*, this Court had never before held that such a showing was necessary in order to advance a viable compelled speech claim. Indeed, if such a requirement were part of this Court's compelled speech jurisprudence, it is likely that many prior cases would have been decided differently. See, e.g, *Riley*, 487 U.S. at 797-98 (striking down compelled disclosure of facts).

The First Amendment is premised on the notion that government may not compel a citizen to speak, whether he or she agrees with, disagrees with, or has no opinion regarding the message he or she is being forced to relay. An American need not reveal his or her views on an issue in order to preserve his or her First Amendment rights. To avoid being compelled to salute the flag, for instance, it is not necessary to show that you disagree with the message conveyed by saluting the flag. A patriotic American who may regularly salute the flag in private retains the right to refrain from doing so in public under threat of government sanction. See, e.g., *Barnette*, 319 U.S. at 635.

Besides having no legal relevance, however, the Court's no "crisis of conscience" justification is based on a fundamentally erroneous premise. As the instant case

demonstrates, agricultural producers can very easily disagree with the message that is conveyed through generic advertising programs. United Foods' advertising campaign, for instance, conveys the message of product differentiation, seeking to persuade consumers to purchase its "Pictsweet" mushrooms rather than other mushrooms in the marketplace. Implicit in the company's marketing efforts is the message that "Pictsweet" mushrooms are better than other mushrooms consumers may choose to purchase. The generic mushroom advertising that is funded by the Mushroom Council, however, undermines this message. Generic advertising portrays products as "indistinctive" in spite of brand. See Comment, *The Effect of* Glickman v. Wileman Brothers & Elliott, Inc. *on Non-generic Commodities*, 9 San Joaquin Agric. L. Rev. 95, 113 (1999). These promotional efforts imply that mushrooms are a homogenous product and that one brand of mushrooms is as good as another.

Moreover, generic advertising can easily implicate political or ideological issues, leading producers to experience what might be seen as a more paradigmatic "crisis of conscience." In one recent Ninth Circuit case, for instance, a dairy producer objected to the fact that it was being compelled to financially support a generic advertising campaign promoting the use of bovine growth hormone (BGH). See *Gallo Cattle Co. v. United States Dep't of Agriculture*, 1999 U.S. App. LEXIS 17959 at *3 (9th Cir. July 27, 1999). Despite the fact that use of BGH is currently a very controversial issue in agricultural policy, see "Maine's Largest Dairy Promoting Hormone-Free Milk," *Associated Press State & Local Wire* (Feb. 19, 2001) BC cycle (reviewing dispute over use of BGH), and that the Ninth

Circuit admitted that the producer may have had legitimate "ideological objections" to use of the hormone, the Ninth Circuit felt compelled by this Court's opinion in *Glickman* to reject the dairy producer's compelled speech claim. See *Gallo Cattle Co.* at *3. Moreover, the facts of the instant case even implicate ideological issues given the Mushroom Council's promotions associating mushroom consumption with sex and alcohol.[9] See *supra* at 3.

An agricultural producer can also disagree with the message conveyed by a generic advertising campaign for another reason as well. As the California Supreme Court also noted, "Generic advertising can be manipulated to serve the interests of some producers rather than others, as by allowing some to develop a kind of brand by means of funds assessed from all and then use it for their own exclusive benefit." *Gerawan Farming, Inc.*, 12 P.3d at 743. "Thus," the Court continued, "in any given case, a producer who objects to generic advertising may not be

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[9] These examples help to demonstrate how this Court's attempt to separate political or ideological speech from other types of speech rests on an artificial distinction. In real life, speech is not so easily categorized, and a rule of law requiring such categorization is bound to be uncertain and difficult to apply. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990) (using the example of a company urging consumers to oppose apartheid by purchasing its products as opposed to those of its competitor doing business in South Africa). It is for this reason that *amicus* believes Justice Thomas was correct in *44 Liquormart* when he called for this Court to end its current practice of subjecting restrictions on the spread of truthful commercial information to lower First Amendment scrutiny under the *Central Hudson* test and instead to subject such restrictions to strict scrutiny. See *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

attempting to ride free on the funds of others – a familiar charge – but may merely be making an effort to prevent others from hijacking his own funds as they drive to their own destination." *Id.* Such a phenomenon, in fact, may have occurred in the highly controversial generic advertising program for pork administered by the National Pork Producers Council (NPPC). A Missouri pork farmer's complaint about the use of her compelled payments is typical: "For years, the NPPC has been using our money to represent the interests of corporate factory farms and meatpackers." William Claiborne, "Hog Producers Defeat 'Pork Checkoff,' " *Washington Post* (Jan. 16, 2001) at A2.

The facts of this case underscore the untenable nature of the requisite factual inquiry that would be required under the *Glickman* standard. Here, respondent is being compelled, for instance, not just to fund mushroom advertising but advertising for Gallo wines. It may or may not be that respondent, or others who are compelled to support the advertising, "agree" with the message conveyed. But that is beside the point: surely a business cannot be required to pay for advertising someone else's product. Yet, that is the implication of a precedent that establishes the line of demarcation at whether the compelled speaker "agrees" with the speech. Instead, the bright-line rule should be exactly where it is in all other areas of First Amendment jurisprudence: no one can be required to cede editorial control over a commercial message.

In *Glickman*, this Court asserted that the mandatory assessments for generic tree fruit advertising should be evaluated under the same scrutiny as the other aspects of the federal regulatory scheme applicable to the industry.

See *Glickman*, 521 U.S. at 474 ("We are not persuaded that any greater weight should be given to the fact that some producers do not wish to foster generic advertising than to the fact that many of them may well object to the marketing orders themselves because they might earn more money in an unregulated market"). However, the problem with this argument is again obvious. While regulations regarding uniform prices, production limits, and joint research projects do not implicate speech, compelled assessments for generic advertising programs do, and the First Amendment makes it clear that free speech deserves special protection in our constitutional framework.

In the years since *Glickman*, it has been criticized "with virtual unanimity" across the ideological spectrum. See *Gerawan Farming, Inc.*, 12 P.3d at 743. The California Supreme Court has stated that *Glickman*'s "legal component is driven not so much by principled reasoning as by ad hoc distinguishing." *Id.* Academic commentators have referred to *Glickman* as an "errant aberration" and a "house-of-cards opinion based on a faulty premise." 2 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech* (1999) § 20:45, pp. 20-114 to 20-115; Nicole Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 Mo. L. Rev. 929, 960 (1998). See, e.g., Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. Rev. 717, 743 n.84 (1998); Comment, Glickman v. Wileman Brothers & Elliott, Inc., *Don't Put Words in My Mouth*, 33 New Eng. L. Rev. 989, 1004-1028 (1999); *The Supreme Court, 1996 Term: Leading Cases*, 111 Harv. L. Rev. 197, 319-29 (1997).

As has been shown, *Glickman* cannot be reconciled with this Court's compelled speech jurisprudence or commercial speech jurisprudence. As such, if not overruled, it will either stand one day as an historical oddity or signify the first step in a significant retrenchment of the protection afforded by the First Amendment's freedom of speech guarantee. Rather than run the risk that the latter will become true, this Court should faithfully apply the logic of its pre-*Glickman* precedents and overrule *Glickman*.

If this Court does overrule *Glickman* and applies First Amendment scrutiny to the challenged mandatory assessments in this case, this Court has little choice but to affirm the Sixth Circuit's judgment that the assessments are unconstitutional. See *Glickman*, 521 U.S. at 491-504 (Souter, J., dissenting). Whether this Court applies its traditional *Central Hudson* test or the strict scrutiny *amicus* believes should be used to evaluate restrictions on the free flow of truthful commercial information, see *supra* at 22 n.9, the mandatory assessments charged by the Mushroom Council for generic mushroom advertising do not even come close to passing First Amendment muster. See *Glickman*, 521 U.S. at 491-504 (Souter, J., dissenting).

CONCLUSION

For all the foregoing reasons, this Court should apply First Amendment scrutiny to the compulsory assessments at issue in the instant case and affirm the Sixth Circuit's judgment that the use of these compelled payments to fund generic mushroom advertising runs afoul of the First Amendment.

Respectfully submitted,

WILLIAM H. MELLOR*
CLINT BOLICK
SCOTT G. BULLOCK
MATTHEW B. BERRY
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., N.W.
Suite 200
Washington, DC 20006
(202) 955-1300

* *Counsel of Record*